

GARFIELD COUNTY

IBLA 95-652

Decided February 24, 1999

Appeal from a decision of the Director, Utah State Office, Bureau of Land Management, finding no significant impact from improvement of the Boulder-to-Bullfrog Road in accordance with the preferred alternative analyzed in the finding of no significant impact and the associated environmental assessment. UT-040-89-6.

Affirmed.

1. National Environmental Policy Act of 1969: Environmental Statements

An environmental analysis of the impacts of a proposed action under the National Environmental Policy Act of 1969 properly includes the indirect impacts of the activity which are reasonably foreseeable as a consequence of the actions including those resulting from changes in the nature and volume of use of the public lands.

2. National Environmental Policy Act of 1969: Environmental Statements

In reviewing the environmental impacts of a proposed action pursuant to the National Environmental Policy Act of 1969, BLM properly considers reasonable alternatives to the proposal which may feasibly accomplish the purpose and have a lesser impact. A finding of no significant impact for the preferred alternative to the proposed action is properly affirmed when it appears that the proposed action would significantly impact a BLM wilderness study area as well as lands within units of the National Park Service.

APPEARANCES: Barbara Hjelle, Esq., St. George, Utah, for appellant; David K. Grayson, Esq., Assistant Field Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; Wayne G. Petty, Esq., and William J. Lockhart, Esq., Salt Lake City, Utah, for intervenors, National Parks and Conservation Association, Southern Utah Wilderness Alliance, and Utah Chapter of the Sierra Club.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by Garfield County, Utah, from a Finding of No Significant Impact (FONSI) dated February 9, 1995, issued by the State Director, Utah State Office, Bureau of Land Management (BLM). In that determination, BLM found that no significant environmental impact would result from improvement of the "Boulder-to-Bullfrog Road" in southeastern Utah in accordance with the preferred alternative identified by BLM and the National Park Service (NPS), U.S. Department of the Interior, in the FONSI. The BLM finding was based in large part on a March 1993 Environmental Assessment (EA), EA No. UT-040-89-6. BLM thus concluded that no environmental impact statement (EIS) was required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994).

The Road (also known as the "Burr Trail") is a 65.9-mile-long road which crosses Federal land under the administration of BLM (Escalante and Henry Mountain Resource Areas) and NPS (Capitol Reef National Park and Glen Canyon National Recreation Area (NRA)), as well as State land. 1/ The Road is divided into four segments: Segment 1 (30.7 miles) -- from the town of Boulder, Utah, to the western boundary of the National Park (primarily, BLM-administered land); Segment 2 (8.4 miles) -- through the National Park (primarily, NPS-administered land); Segment 3 (19.2 miles) -- from the eastern boundary of the National Park to the northern boundary of the Glen Canyon NRA (primarily, BLM-administered land); Segment 4 (7.6 miles) -- through the Glen Canyon NRA to the Bullfrog Basin Marina on the shores of Lake Powell (primarily, NPS-administered land).

The Road runs 19-1/2 miles along the boundary of three wilderness study areas (WSA's) on public lands administered by BLM: Steep Creek and North Escalante Canyons/The Gulch (Segment 1) and Mount Pennell (Segment 3). Under the terms of section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1994), BLM is required to manage WSA's "so as not to impair the[ir] suitability * * * for preservation as wilderness," pending a determination by Congress whether to designate them as wilderness. This nonimpairment standard is subject to "valid existing rights." 90 Stat. 2786 (1976). 2/ However,

1/ The Acting Regional Director, Rocky Mountain Region, NPS, also signed the FONSI, on Feb. 8, 1995.

2/ It is now settled that, to the extent it crosses Federal lands, the County holds a right-of-way for the Road, under Revised Statutes (R.S.) 2477, originally codified at 43 U.S.C. § 932 (1970) (repealed, effective Oct. 21, 1976, by section 706(a) of FLPMA, Pub. L. No. 94-579, 90 Stat. 2793, subject to valid existing rights-of-way). Sierra Club v. Hodel, 848 F.2d 1068, 1073 (10th Cir. 1988); Sierra Club, 111 IBLA 122, 129 (1989), aff'd in part, Sierra Club v. Hodel, 737 F. Supp. 629 (D. Utah 1990), aff'd sub nom., Sierra Club v. Lujan, 949 F.2d 362 (10th Cir. 1991). Thus, the County is entitled to the right-of-way, and its attendant rights, as they existed under State law at the time of repeal

even when such rights exist, BLM is generally required, in managing the affected public lands, to "take any action required to prevent unnecessary or undue degradation of the lands and their resources." 43 U.S.C. § 1782(c) (1994).

Plans by the County to improve the Burr Trail have been the subject of extensive administrative review by this Board and litigation in the courts. Earlier plans by the County to improve (but not pave) the western 28 miles of the Road (Segment 1) were the subject of a lawsuit against BLM and Garfield County asserting that BLM had breached its responsibilities under section 102 of NEPA and provisions of FLPMA, 43 U.S.C. §§ 1701-1784 (1994), regarding management of the affected public lands. The litigation resulted in a judicial remand of this matter to BLM to conduct an EA of the proposed action and to generate either an EIS or a FONSI. Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988), aff'g in part and rev'g in part, 675 F. Supp. 594 (D. Utah 1987). On remand, BLM considered a proposal to upgrade those portions of the Road located on BLM-administered lands (Segments 1 and 3). Impacts of the proposal were considered in an EA dated March 7, 1989 (No. UT-040-89-6). Subsequently, BLM issued separate FONSI's for the improvement of Segments 1 and 3. An appeal of this action of BLM was considered by the Board in Sierra Club, 111 IBLA at 122.

Regarding the proposal to improve Segment 1 of the Burr Trail across public lands pursuant to the Harper contract involving grading and graveling the road to a two-lane width with drainage improvements, we affirmed the BLM FONSI, due to the absence of any unnecessary or undue degradation of any WSA which would give rise to a significant impact. 111 IBLA at 133. ^{3/} With respect to the adequacy of the EA and the FONSI's to support the proposal to pave both Segments 1 and 3 of the Burr Trail, the Board found that BLM had improperly segmented the scope of the environmental analysis in ignoring the cumulative impacts of connected actions. In particular, we noted the evidence in the record of impacts both to BLM WSA's and to lands administered by NPS resulting from the plan to construct a through road from Boulder to Lake Powell with the consequent change in the quantity and nature of public usage. 111 IBLA at 135-36. Accordingly, the Board remanded for further environmental analysis the proposal to improve and pave the length of the Burr Trail.

fn. 2 (continued)

of R.S. 2477 on Oct. 21, 1976, including the right to take any action regarding improvement of the right-of-way which is "reasonable and necessary" to accommodate all of the types of uses which existed before that date. Sierra Club v. Hodel, 848 F.2d at 1083-84, 1086 n.16. The Court specifically held that the County is entitled to take whatever action is reasonable and necessary to "ensure safe travel" by County residents, tourists, and other pre-Oct. 21, 1976, users, "including improving the road to two lanes so travelers could pass each other." Id. at 1084.

^{3/} This aspect of the Board's decision was affirmed on judicial review. Sierra Club v. Lujan, 949 F.2d at 362.

Review of this aspect of the Board's decision was also sought in the Federal courts. On judicial review, the District Court vacated the Board's remand to BLM and ordered the Board to determine the sufficiency of BLM's 1989 EA and FONSI as they relate only to Segment 3 of the Burr Trail. Specifically, the court directed the Board to "make a determination regarding the sufficiency of the BLM's 1989 EA and FONSI as it relates to segment 3, and only segment 3, of the Burr Trail, and that the IBLA do so consistent with [the Court's] opinion." Garfield County v. Lujan, No. 90-C-776J (D. Utah, Apr. 13, 1992), Memorandum Opinion and Order at 12.

On judicial remand, we issued an Order dated July 13, 1993, addressing the merits of the appeal in accordance with the District Court mandate. Finding that the parties and this Board were bound by the District Court's decision, we declined to defer our ruling on the adequacy of the BLM FONSI's pending resolution of an appeal to the Circuit Court in the absence of a stay of the District Court's ruling. (Order, dated July 13, 1993, at 3-4.) We then held that BLM had taken a hard look at the environmental impacts of paving Segment 3 on the WSA's, and properly concluded that no significant impact would occur, since such action would not result in unnecessary or undue degradation of the WSA's. *Id.* at 5-6. We thus affirmed BLM's March 8, 1989, Record of Decision (ROD)/FONSI's.

Subsequently, on November 24, 1993, the Circuit Court held in Garfield County v. Sierra Club, No. 92-4162 (10th Cir.), that the District Court "lacked jurisdiction" to issue its April 13, 1992, Memorandum Opinion and Order, vacating the Board's September 29, 1989, decision, since that decision was not final agency action. (Order and Judgment, dated Nov. 24, 1993, at 2.) The Circuit Court thus directed the District Court to dismiss appellant's original complaint. The District Court did so on February 25, 1994, issuing an Amended Order of Dismissal.

While judicial review was pending of the Board decision setting aside and remanding the FONSI's issued by BLM for the County proposal to pave both Segments 1 and 3 of the Burr Trail, BLM endeavored to comply with our decision. In this process, BLM (in cooperation with NPS) prepared a new EA dated March 1993 analyzing the impacts of the County's proposal to upgrade and eventually pave the length of the Burr Trail.

The County has proposed to upgrade the entire Road to a maximum 28-foot-wide bituminous, paved road surface over a gravel base, so as to ensure safe access by existing users, including County residents and tourists, to eastern Garfield County and the Bullfrog Basin Marina on the shores of Lake Powell. (EA at 10, 25.) This would require widening Segment 1 from its existing 21 (2-1/2 miles) and 26 (28 miles) feet and part of Segment 3 from its existing 26 feet (11-1/2 miles), following any necessary sub-grade widening and grading. *Id.* at 28, 31. In addition, part of Segment 1 and all of Segment 3 would have to be paved, since they were either dirt (7-1/2 miles of Segment 3) or chip sealed (28 miles of Segment 1 and 11-1/2 miles of Segment 3). *Id.* The remaining 2-1/2 miles of Segment 1 were already paved. *Id.* at 28. The upgraded Road would follow the existing alignment as much as practicable. *Id.* at 26.

In assessing the environmental consequences of undertaking the proposed action (Alternative A), BLM and NPS also considered three alternatives thereto in the 1993 EA. Alternative B (Limited Improvement) provided for not paving those portions of Segments 1 and 3 already chip sealed and chip sealing the remainder of Segment 3. (EA at 32.) Alternative C (Continuation of Existing Plans) provided for either graveling or paving Segments 1 and 3 to a maximum width of 28 feet, in accordance with the plans earlier approved by BLM in two March 8, 1989, ROD/FONSI's. Id. at 33. Alternative D (Continuation of Existing Conditions) is the no action alternative. Id. at 34. In the EA, BLM acknowledged that, in the case of alternatives B, C, and D, implementation could only be effected with the concurrence of the County, since they were inconsistent with the County's proposal. Id. at 25.

Following preparation of the EA in March 1993, BLM, together with NPS and the County, attempted to develop an alternative acceptable to all three parties, but were unsuccessful. (FONSI at 1; BLM Answer at 7.) Subsequently, BLM and NPS issued a joint FONSI for their preferred alternative, which combined elements of the four alternatives addressed in the EA. (FONSI at 1.) It provided for limited improvement of the Road by not paving portions of Segments 1 and 3 already chip sealed, but patching the chip sealing where necessary. Id. at 2. The 7-1/2 miles of Segment 3, which runs along the boundary of the Mount Pennell WSA, would be improved from a dirt to a gravel surface. (FONSI at 2; BLM Answer at 16.) Segment 2 (Capitol Reef NP) "would be managed as a low impact, low speed, safe, all-weather route for most two-wheel drive vehicles." (FONSI at 2.) Graveling of the surface might be used where needed to mitigate slippery clay surfaces. Id. In Segment 4, the Road would be upgraded to no more than a chip seal surface to ensure traction. Id.

In his February 1995 FONSI, the State Director concluded that the BLM preferred alternative would afford a safe, all-weather route, which protected the "sensitive and unique" nature of the Federal lands along the Road. (FONSI at 1.) Relying on the March 1993 EA, he considered the environmental consequences of adopting that alternative versus the County's proposed action or other alternatives, noting that, in either case, they primarily concerned impacts resulting from "road construction" and "increased visitor use as well as impacts to the back-country and wilderness values associated with the lands adjacent to the 'Burr Trail.'" Id. at 4. The State Director stated:

Impacts from road construction and visitor use will result in some direct impacts[] that may potentially affect the overall character of the area and the nature of the visitor experience to the National Park Service units and specifically to Capitol Reef National Park. * * * Capitol Reef, as well as adjacent BLM administered WSAs, are managed as primitive areas so [as] not * * * to impair their wilderness characteristics and values, and significant increases in the kinds or types of motorized access or in nonwilderness activities in the area could harm these values.

Under the preferred alternative [identified by BLM], these impacts would not be significant. The partially improved road proposed under the preferred alternative would allow for reliable access to the areas it traverses without fundamentally changing the character of the area or the visitor experience. While under this preferred alternative some construction work[] would occur and use of the road may increase, the limited nature of the improvements would not result in significant impacts. A partially improved road that retains a somewhat primitive character while at the same time providing improved reliability is likely to increase visitation from people seeking back country experiences, from off-road vehicle enthusiasts, and from sightseers. In addition, some increase in other through traffic including local and commercial uses may be expected. * * *

Under other alternatives evaluated in the environmental assessment that contemplated a significantly altered road, significant impacts to resources and to the visitor experience of these resources are likely. * * * Recreational vehicle and tour bus use and heavy commercial traffic would be more likely to use a significantly altered road as a thoroughfare, creating direct, indirect and cumulative impacts on adjacent resources and making the area less suitable for and attractive as a gateway to a wilderness experience. Greatly increased traffic volume and speed would increase the potential for conflicts with wildlife and for damage to the soils and vegetation near the road.

Id. The various impacts of the County's proposal and the resulting potential increase in traffic volume from an average of 28 to 100 vehicles per day (increasing to 170 vehicles per day by the year 2010) versus 37 vehicles per day without the County's proposed improvement were analyzed in some detail in the EA. (EA at 78, 81, 84-88, 99-100.) Impacts on soils, vegetation, and wildlife along the route of the Road, including Segments 1 and 3 across BLM-administered land, particularly resulting from the increased volume of traffic, were discussed. Id. at 78, 81, 84-88. Potential increased impact from off-road vehicle use was also noted. Id. at 85. Also noted was a change in the character of the recreational experience of the visitor from a primitive type to a "drive-through" recreational experience. Id. at 98. The impact of increased access to wilderness areas would include a decrease in opportunities for a sense of solitude and remoteness. Id. at 100.

In the end, the State Director concluded that significant impacts would likely result from approving the County's proposed action, but that no such impact was likely to occur as a consequence of implementing the BLM preferred alternative. (FONSI at 5-6.) Thus, an EIS would be required before BLM could approve the County's proposal, but none was required prior to adopting the BLM preferred alternative. (FONSI at 6; BLM Answer at 12, 21.) Also, in a February 9, 1995, cover letter which

accompanied the FONSI, the State Director stated that the FONSI constituted the "decision document," and thus approved implementation of the BLM preferred alternative for improvement of Segments 1 and 3 of the Road. The County appealed from the FONSI.

Appellant reports that, during the pendency of its appeal, certain work was completed on Segment 3, including sub-grade preparation, drainage installation, grading, and earthwork construction, and that all that remains is to "finish applying the appropriate road surface." (Reply at 2; see BLM Answer at 7; NPCA et al. Motion to Vacate at 25.) BLM states that all of this work had been authorized. (Answer at 21.)

Appellant asserts in its Statement of Reasons (SOR) for Appeal that the discretion of BLM in this matter of regulating improvements to the right-of-way is limited to preclusion of unnecessary or undue degradation to WSA's including the duty to consider and impose a less degrading alternative, citing Sierra Club v. Hodel, 848 F.2d at 1090-91. (SOR at 11.) Further, appellant contends that unnecessary or undue degradation is defined as "impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of the best reasonably available technology," citing the BLM Interim Management Policy for lands under wilderness review.^{4/} Appellant argues that the authority of BLM is limited to the direct impacts of road construction and does not properly consider impacts resulting from use of the right-of-way as the latter must be regulated by exercise of BLM's other land management authority. (SOR at 12-13.) It is contended by appellant that neither the EA nor the FONSI reflect that the County's plans for improvement of the right-of-way would constitute unnecessary or undue degradation of the Federal lands. Id. at 30.

An Answer has been filed by BLM contending that the 1993 EA documents the adverse impacts which the County's proposed improvements would have to Federal lands along the route, although BLM acknowledges that the EA does not use the terms unnecessary or undue degradation. (Answer at 8-11.)

Further, BLM asserts that the 1995 FONSI identifies significant impacts (direct, indirect, and cumulative) likely to result from the County's planned improvements. Id. at 12. Further, BLM argues that it is not limited to consideration of the County's proposal, but is required to consider a range of alternatives in its review pursuant to NEPA. Id. at 15. In light of the impacts documented in the record, BLM contends a FONSI for the County's proposal could not be supported. Id. at 16. It is also asserted by BLM that appellant errs in contending that all of its proposed activities are within the scope of its right-of-way and thus outside the

4/ Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 Fed. Reg. 72014 (Dec. 12, 1979), and Interim Management Policy and Guidelines (Revised IMP), 48 Fed. Reg. 31854 (July 12, 1983).

range of BLM consideration, arguing that the cases have not held that the County's R.S. 2477 right-of-way includes a right to pave the road or to relocate the existing road bed. Id. at 17. Additionally, BLM asserts that preclusion of unnecessary and undue degradation to WSA's is not the only management authority relevant to appellant's proposed road improvements. Id. at 18.

A Reply to the BLM Answer has been filed by appellant asserting that BLM has no authority to dictate the surface treatment (e.g., asphalt paving as opposed to gravel) for the improvement of the Burr Trail. (Reply at 3.)

Appellant contends any impacts found in the EA are reasonable and necessary to build a safe road consistent with applicable standards and would not cause unnecessary or undue degradation. Id. at 9. Appellant asserts it has the discretion to build the "type of road that is required to meet the exigencies of increased travel on the Road." Id. at 10.

The National Parks and Conservation Association, Southern Utah Wilderness Alliance, and Utah Chapter of the Sierra Club (collectively referred to as NPCA et al.) have filed a Motion to Intervene in this appeal. Movants note that they were parties as appellants in the appeal which led to the prior Board decision in this matter. They assert that the BLM decision challenged in the present appeal was essentially implementing the prior Board decision in this matter. Further, movants point out that they would be adversely affected if appellant prevails in this appeal. Movants have filed a Motion to Vacate the Board Order of July 13, 1993, issued in response to the District Court Order in this case which was itself subsequently vacated on the ground that the prior Board decision in this matter remanding the case to BLM was not a final Departmental decision in this case. In support, movants contend that the District Court decision which was the clear predicate for the prior Board Order was vacated for lack of jurisdiction.

Movants have also filed an Answer in this case. It is contended by NPCA et al. that BLM and NPS have a duty to protect sensitive resources on public lands and national park lands as well as an obligation to avoid unnecessary and undue degradation to WSA's. Further, NPCA et al. assert that impacts of changes in the nature and volume of traffic using the road as a consequence of paving the road are properly considered, citing our prior decision in this matter, Sierra Club, 111 IBLA at 135. (Answer at 19.) Additionally, they contend that consideration of the cumulative impacts of the proposal to pave the length of the road on both the public lands and NPS lands is required. Id. at 21-22.

Counsel for appellant moved to dismiss the Motion to Vacate the prior Board order and the Motion to Intervene. Appellant asserted that, to the extent reconsideration of the 1993 Order was sought, no timely petition for reconsideration had been filed. Further, appellant argued this was an attempt at an untimely appeal. Appellant also contended that it was not properly served with a copy of the Motion to Intervene. In the alternative, appellant requested that the Board order movants to complete service

and allow appellant an opportunity to respond. By Order dated October 5, 1995, we took the motions under advisement and allowed appellant an opportunity to respond to the Motions to Intervene and to Vacate the 1993 Order.

As a threshold matter, we address the Motion to Intervene. Movants NPCA et al. participated as appellants before this Board in the prior administrative appeal involving County plans to improve the Burr Trail. Sierra Club, 111 IBLA at 122. It was the remand in this prior decision which led to the BLM decision under appeal in this case. They have also participated in litigation with this Department regarding allowance of improvements to the Burr Trail. Under these circumstances, we find that they are parties to the case who could be adversely affected by the outcome of the decision in this case. Accordingly, they have standing to intervene and the Motion to Intervene is granted. See Sierra Club - Rocky Mountain Chapter, 75 IBLA 220, 221-22 n.2 (1983).

With respect to the Motion to Vacate our Order of July 13, 1993, and appellant's objection to the Motion, we note that the issue in the appeal before us is the propriety of the BLM decision from which this appeal is brought. In this regard, we think that it is clear from the BLM decision that it viewed our Order to be moot as a result of the subsequent course of the litigation and the remand to BLM. Appellant has shown no error in the BLM decision in this regard. Our Order was clearly predicated on the District Court's April 13, 1992, Memorandum Opinion and Order which we found to be binding on the parties and this Board. The District Court Order was subsequently vacated for lack of jurisdiction on the ground that the Board's earlier decision, Sierra Club, 111 IBLA at 122, was not a final agency decision in view of our remand to BLM in that opinion. This had the effect of restoring the Board's decision remanding the case to BLM for further analysis of the environmental impact of the proposed improvement of the Burr Trail and mooted the Board's Order of July 13, 1993. We find that BLM properly treated our Order of July 13, 1993, as effectively moot and proceeded to analyze the impacts of improvement of the Burr Trail. We affirm the BLM decision in this regard and, thus, find the prior Board Order of July 13, 1993, to have been mooted. Thus, the Motion to Vacate the Order is now also properly denied as moot.

[1] The relevant regulations promulgated pursuant to section 102(2)(C) of NEPA define the "effects" that an agency must consider in its environmental analysis to include indirect effects:

Indirect effects * * * are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

40 C.F.R. § 1508.8(b). Hence, section 102(2)(C) of NEPA and its implementing regulations require BLM to consider the potential environmental

impacts of appellant's proposed road improvement project, including the impacts of all activity which is the reasonably foreseeable consequence of that project, so that it is fully informed before taking substantive action. See Sierra Club v. Marsh, 976 F.2d 763, 767-68 (1st Cir. 1992); James Shaw, 130 IBLA 105, 113 (1994); Howard B. Keck, Jr., 124 IBLA 44, 47-49, 51 (1992), aff'd, Keck v. Haste, No. S92-1670-WBS-PAN (E.D. Cal. Oct. 4, 1993); 40 C.F.R. § 1500.1(b) and (c). Thus, we find no error in BLM consideration of the indirect effects of paving the entire length of the road. We have previously noted that the record discloses potentially significant impacts from the proposal to pave the entire length of the road resulting from a change in the nature and level of recreational use. Sierra Club, 111 IBLA at 135. The fact that BLM may have other management options to control visitor use, as appellant points out, does not alter the need to consider the indirect impacts.

[2] Further, BLM is required by section 102(2)(E) of NEPA, as amended, 42 U.S.C. § 4332(2)(E) (1994), to consider "appropriate alternatives" to the proposed action, as well as their environmental consequences. See 40 C.F.R. §§ 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984); Howard B. Keck, Jr., 124 IBLA at 53. Such alternatives should include reasonable alternatives to a proposed action, which will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser impact. 40 C.F.R. § 1500.2(e); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d at 1466-67; Howard B. Keck, Jr., 124 IBLA at 53. All of this ensures that the BLM decisionmaker "has before him and takes into proper account all possible approaches to a particular project." Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

In this case, BLM complied with section 102(2)(E) of NEPA by considering not only appellant's proposed action, but also the three other alternatives in the initial March 1993 EA and the additional BLM preferred alternative addressed in the State Director's February 1995 FONSI. The Court in Sierra Club v. Hodel noted that "when a proposed road improvement will impact a WSA the agency has the duty under FLPMA § 603(c) and the regulation to determine whether there are less degrading alternatives, and it has the responsibility to impose an alternative it deems less degrading upon the nonfederal actor." 848 F.2d at 1090-91. While noting that BLM's discretion is limited by its "inability to deny the improvement altogether," the Court held "it is sufficient * * * to invoke NEPA requirements." Id. at 1091. With respect to existing R.S. 2477 rights-of-way, the Court held that "BLM has no power to designate alternatives" regarding "improvements on R.S. 2477 rights-of-way that do not affect WSAs or implicate other federal duties containing some measure of discretion." 848 F.2d at 1090. We do not read the Court's opinion as limiting NEPA consideration to direct construction encroachments on WSA lands in the context of the present County proposal to pave the entire road when the record discloses potential impacts to both BLM WSA and NPS-administered lands in

Capitol Reef NP and Glen Canyon NRA. Sierra Club, 111 IBLA at 136. The question of unnecessary and undue degradation with respect to proposed improvements necessarily invokes consideration of alternatives and whether improvements, e.g., paving of the entire road, are reasonably necessary to the "traditional uses to which the right-of-way was put" as of October 21, 1976. Sierra Club v. Hodel, 848 F.2d at 1083-84. In the context of an R.S. 2477 right-of-way, we are unable to accept appellant's contention that the issue of unnecessary and undue degradation is limited solely to whether construction of improvements utilizes the best reasonably available technology. Accordingly, we conclude that appellant has shown no error by BLM in the conduct of its environmental review with respect to analysis of impacts of the proposal or consideration of alternatives.

Appellant has not shown that the State Director's decision to issue a FONSI for the BLM preferred alternative interferes with its ability to take action reasonable and necessary to ensure safe travel by pre-October 21, 1976, users of its R.S. 2477 right-of-way, and thus violates its rights under that statute. Appellant is entitled by virtue of its right-of-way under R.S. 2477 to improve the road as reasonably necessary to provide "safe travel" over the Road by those types of users who were using the Road at the time of the repeal of the statute on October 21, 1976. Sierra Club v. Hodel, 848 F.2d at 1083-84. While appellant was thus entitled to gravel and widen the Road to two lanes in order to accommodate such travel, as it had originally sought, 848 F.2d at 1073, 1084-85, it appears that BLM is correct in stating that "[n]owhere * * * did any Court decide that the County had, by virtue of R.S. 2477 * * *, the right to pave the road." (Answer at 17.) Indeed, the District Court held, in Sierra Club v. Hodel, 737 F. Supp. at 636, that "[a]ny expansion of the scope of the [Burr Trail] project to include * * * paving any portion of the route is outside the law of the case" decided in Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988). See Sierra Club v. Lujan, 949 F.2d at 369. Further, appellant has not established that paving the length of the Road is both reasonable and necessary to ensure safe travel.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the State Director's February 1995 FONSI is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge